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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

KAY ANN KROGUL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE APPELLATE COURT OF ILLINOIS,
SECOND JUDICIAL DISTRICT**

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QUESTION PRESENTED

Is the double jeopardy clause violated when, following an acquittal on murder and a hung jury on voluntary manslaughter, the prosecution attempts to re-try defendant for voluntary manslaughter, since Illinois defines the latter crime as merely consisting of all the elements of murder plus certain mitigating circumstances?

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**PETITION FOR A WRIT OF CERTIORARI TO
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SECOND JUDICIAL DISTRICT**

*To the Honorable Chief Justice and the Associate
Justices of the Supreme Court:*

Kay Ann Krogul petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois, Second District, in this case.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second District, is reported at 115 Ill. App. 3d 734, 450 N.E.2d 20 (1983). The order of the Supreme Court of Illinois denying leave to appeal on October 4, 1983 is as yet unreported.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on May 27, 1983 (App. A). The Supreme Court of Illinois denied leave to appeal on October 4, 1983 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in pertinent part:

. . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

The Illinois Criminal Code of 1961 provides in pertinent part:

9-1. MURDER

(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He intends either to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; . . .

—Ill. Rev. Stat. ch. 38,
par. 9-1(a) (1981)

9-2. VOLUNTARY MANSLAUGHTER

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

—Ill. Rev. Stat. ch. 38,
par. 9-2(b) (1981)

STATEMENT OF THE CASE

On November 16, 1981, the Lake County, Illinois, grand jury returned a four count indictment against Petitioner Kay Ann Krogul. Three of the counts were for murder, with each count specifying a different state of mind (*see* Ill. Rev. Stat. ch. 38, pars. 9-1(a)(1) and 9-1(a)(2) (1981)). The fourth count was for voluntary manslaughter based on an unreasonable belief of self-defense (Ill. Rev. Stat. ch. 38, par. 9-2(b) (1981)). (C. 13) All four counts arose out of one alleged homicide.

Prior to trial, the State entered a *nolle prosequi* on the voluntary manslaughter count. (C. 28) At trial, however, both the prosecutor and defense requested that the jury be instructed on voluntary manslaughter based on unreasonable belief of self-defense (Ill. Rev. Stat. ch. 38, par. 9-2(b) (1981)), and the trial judge obliged. The jury was also instructed on justifiable use of force, *i.e.* self-defense. Ill. Rev. Stat. ch. 38, par. 7-1 (1981).

Following deliberations, the jury returned a verdict of "not guilty" for the offense of murder, and a judgment

of acquittal was entered on that charge. (C. 72) However, the jury was unable to reach a verdict on the voluntary manslaughter charge, and a mistrial was declared. (C. 74)

The State subsequently attempted to re-try Petitioner on the voluntary manslaughter charge. Petitioner filed a motion to dismiss claiming that a second trial was barred by the previous acquittal. The trial court denied the motion. (C. 86-91) Petitioner then appealed, pursuant to Illinois Supreme Court Rule 604(f). *See* 87 Ill. 2d R. 604(f), effective July 1, 1982.

The Appellate Court made no attempt to analyze the elements of the offenses of murder and voluntary manslaughter, but merely held that double jeopardy did not bar a re-trial on a charge in which a jury failed to reach a verdict. (App. A)

The Supreme Court of Illinois denied Petitioner's request for leave to appeal on October 4, 1983. (App. B)

REASONS FOR GRANTING THE WRIT

This case involves little more than a straight-forward application of the principles of *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 187 (1977) concerning "greater" and "lesser included" offenses for purposes of the double jeopardy clause. U.S. CONST. amend. V. What is unique, however, is that in this case the Illinois Criminal Code punishes the "lesser included offense" *more severely* than the "greater offense." This factual oddity has prevented Illinois courts from fully appreciating the double jeopardy interests at stake in this case.

Kay Ann Krogul was tried for murder. Ill. Rev. Stat. ch. 38, par. 9-1 (1981). At trial, both the State and defendant requested that the jury be instructed on voluntary manslaughter based upon the unreasonable use of deadly force. Ill. Rev. Stat. ch. 38, par. 9-2(b) (1981). The jury returned a "not guilty" verdict as to murder and a judgment of acquittal was entered on that charge. (C. 72) The jury was unable to reach a verdict on the voluntary manslaughter charge and a mistrial was declared. (C. 74) When the State attempted to again try Ms. Krogul for voluntary manslaughter, she objected on double jeopardy grounds. (C. 86-91) Both the trial court and the Appellate Court of Illinois denied relief. (App. A) The Illinois Supreme Court denied her petition for leave to appeal. (App. B)

The general principles of double jeopardy are not in dispute. The double jeopardy clause forbids a second prosecution for the same offense after acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The established test for determin-

ing whether two criminal counts are two offenses or only one is "whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *Brown v. Ohio* compared "greater" and "lesser included offenses" thusly:

As is invariably true of a greater and lesser included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it. 432 U.S. at 168.

With these principles in mind, the Illinois murder and voluntary manslaughter statutes must be examined. It should first be noted that these Illinois offenses bear no relation to the identically named common law crimes. The Illinois Criminal Code of 1961 deleted all references to the common law concept of "malice aforethought." Illinois retained the common law names but jettisoned the common law substance.

The prosecution establishes murder in Illinois simply by showing that a defendant performed acts which caused the unjustified death of the victim and that the acts were performed with one of several specified mental states. Ill. Rev. Stat. ch. 38, par. 9-1(a) (1981). This is the instruction the jury received at the trial (emphasis added):

To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of [the deceased]; and

Second: That when the defendant did so,

(1) She intended to kill or do great bodily harm to [the deceased];

or

- (2) She knew that her act would cause death or great bodily harm to [the deceased];

or

- (3) She knew that her acts created a strong probability of death or great bodily harm to [the deceased];

Third: That the defendant was not justified in using the force which she used.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

Illinois Pattern Jury
Instructions—Criminal
7.02 and 24-25.06A
(2d ed. 1981)

The jury found defendant "not guilty" of this charge and a judgment of acquittal was entered. (C. 72)

The jury at defendant's trial could not agree on a verdict for voluntary manslaughter. This is the instruction the jury received; should there be a second trial, that jury would receive an identical instruction (emphasis added):

To sustain the charge of voluntary manslaughter, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of [the deceased]; and

Second: That when defendant did so,

- (1) She intended to kill or do great bodily harm to [the deceased];

or

- (2) She knew that her acts would cause death or great bodily harm to [the deceased];

or

- (3) She knew that her acts created a strong probability of death or great bodily harm to [the deceased]; and

Third: That when the defendant did so she believed that circumstances existed which would have justified killing [the deceased]; and

Fourth: That the defendant's belief that such circumstances existed was unreasonable.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

Illinois Pattern Jury
Instructions—Criminal
No. 7.06 (2d ed. 1981)

Note that the entire offense of murder is subsumed by voluntary manslaughter. Of the three elements needed to prove murder, the first two elements are identical to the first two elements of voluntary manslaughter; the third element—lack of justification—is presumed by the third and fourth elements of voluntary manslaughter. Unlike common law, which defined manslaughter as "murder minus malice," the Illinois code defines its own version of voluntary manslaughter as "murder *plus* mitigating circumstances." Murder and voluntary manslaughter in Illinois are thus the "same offense" under the *Blockburger* test. A jury has already determined that the elements of murder were not proved beyond a reasonable doubt; since these same elements are all found within the offense

of voluntary manslaughter in Illinois, double jeopardy principles prohibit a second trial for voluntary manslaughter.¹

Illinois courts have exhibited a great deal of confusion concerning the changes in homicide law brought about by the Criminal Code of 1961. See O'Neill, "With Malice Toward None": A Solution to an Illinois Homicide Quandary, 32 DePaul L.R. 107 (1982). Unlike the usual *Brown* situation, here the "greater offense"—i.e., the offense comprised of all the elements of the "lesser included offense" in addition to other elements—is voluntary manslaughter, the offense punished less severely than murder.

This case involves no novel legal question, merely a unique factual twist. Yet granting this petition would help not only to clarify double jeopardy principles, but would also prevent an obvious injustice. Correction of this error after a second trial will come too late. *Abney v. United States*, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977). Moreover Petitioner respectfully suggests that this case is well suited for a summary decision on the merits without the necessity of briefing and argument.

¹ It is undeniable that the jury's two actions—a "not guilty" verdict for murder and a "hung jury" on voluntary manslaughter—were logically inconsistent. Yet this is irrelevant for Double Jeopardy purposes. The relevant fact is that the trial judge entered a judgment of acquittal on the jury's "not guilty" verdict on the murder charge. (C. 72). *Fong Foo v. United States*, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962); *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978); *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); *United States v. Martin Linen Supply*, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977).

CONCLUSION

For these reasons, Petitioner respectfully asks this Court to grant this petition and reverse the decision of the Appellate Court of Illinois, Second District.

Respectfully submitted,

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APPENDIX A

No. 82-623

Filed May 27, 1983

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

KAY ANN KROGUL,

Defendant-Appellant.

Appeal from the Nineteenth Judicial Circuit,
Lake County, Illinois.

JUSTICE HOPF delivered the opinion of the court:

Defendant was indicted on three counts of murder (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1(a)(1) and 9-1(a)(2)), and one count of voluntary manslaughter (Ill. Rev. Stat. 1981, ch. 38, par. 9-2(b)). The State entered a *nolle prosequi* on the voluntary manslaughter count before trial. At trial, both the defendant and the State tendered an instruction on voluntary manslaughter and the State's instruction was given to the jury which tried the case. Defendant also submitted an instruction on justifiable use of force or self-defense, which was also given to the jury. A not-guilty verdict was returned for the offense of murder, and a judgment of acquittal was entered on that charge. The jury was unable to reach a verdict on the voluntary manslaughter charge, and a mistrial was declared.

The State attempted to continue the voluntary manslaughter prosecution, whereupon defendant filed a motion to dismiss claiming that the prosecution was barred by the previous *nolle prosequi* and acquittal. The motion was denied, and defendant appeals pursuant to Supreme Court Rule 604(f). 87 Ill. 2d R. 604(f), effective July 1, 1982.

Defendant contends that her motion to dismiss was erroneously denied because after the *nolle prosequi* of the voluntary manslaughter count and her acquittal of murder, nothing was pending before the court. She further claims that a retrial of the voluntary manslaughter charge is barred by her former acquittal of the greater offense of murder. (See Ill. Rev. Stat. 1981, ch. 38, par. 3-4(b)(1).) For the reasons that follow, we believe defendant's contentions are without merit.

The crime of voluntary manslaughter is a lesser included offense of murder and an accused may be convicted of voluntary manslaughter under an indictment for murder if the evidence warrants such a finding. (*People v. Fausz* (1982), 107 Ill. App. 3d 558, 562, 437 N.E.2d 702; *People v. Ellis* (1982), 107 Ill. App. 3d 603, 611, 437 N.E.2d 409; *People v. Burks* (1981), 103 Ill. App. 3d 616, 619, 431 N.E.2d 1085.) Thus, it is clear that the indictment for murder was sufficient to apprise defendant of the charge of voluntary manslaughter. (*People v. Simmons* (1982), 93 Ill. 2d 94, 100-101, 442 N.E.2d 891.) The State's *nolle prosequi* of the voluntary manslaughter count is therefore of no legal significance, and that count need not be revived by the State in order for the court to retain jurisdiction over the defendant as to that charge. We also note that defendant herself raised the issue of justifiable use of force in the initial trial, submitted an instruction on this issue to the jury, and there was evidence to support this defense. Under these circumstances, an instruction on voluntary manslaughter was required, and a failure to do so would have constituted reversible error on appeal. (*People v. Manley* (1982), 104 Ill. App. 3d 478, 483-84, 432 N.E.2d 1103; *People v. Smith* (1981), 94 Ill. App. 3d 969, 972-73, 419 N.E.2d 404; *People v. Lockett* (1980), 82 Ill.

2d 546, 550, 413 N.E.2d 378.) The charge of voluntary manslaughter was therefore properly before the jury in the original trial of this cause.

It is also well established that where a trial court, absent an abuse of discretion, discharges a jury because of its failure to reach a verdict, the constitutional prohibition against double jeopardy does not bar a new trial on that charge. (*People v. Rehberger* (1979), 73 Ill. App. 3d 964, 969, 392 N.E.2d 395; *People v. Bean* (1976), 64 Ill. 2d 123, 128, 355 N.E.2d 17; *Illinois v. Somerville* (1973), 410 U.S. 458, 35 L. Ed. 2d 425, 93 S. Ct. 1066.) Defendant has not alleged an abuse of discretion in the trial court's discharge of the jury. Thus, it must be presumed no abuse of discretion occurred. It is therefore evident that the reprosecution of defendant on the voluntary manslaughter charge is not barred on double jeopardy grounds.

Finally, defendant claims the retrial is barred by the compulsory joinder provisions of sections 3-3(b) and 3-4(b)(1) of the Criminal Code of 1961. (Ill. Rev. Stat. 1981, ch. 38, pars. 3-3(b) and 3-4(b)(1).) Section 3-3(b) provides:

"(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act."

Section 3-4(b)(1) provides:

"(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

- (1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense with which the defendant should have

been charged on the former prosecution, as provided for in Section 3-3 of this Code (unless the court ordered a separate trial of such charge); or was for an offense which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the offense was not consummated when the former trial began; * * *."

Defendant claims that because she was formerly acquitted of the offense of murder arising out of the same occurrence as that which forms the basis of the voluntary manslaughter charge, that acquittal acts as a bar to her subsequent prosecution for voluntary manslaughter.

As previously stated, an indictment for murder allows a defendant to be convicted of the lesser included offense of voluntary manslaughter. (*People v. Fausz* (1982), 107 Ill. App. 3d 558, 562, 437 N.E.2d 702; *People v. Goolsby* (1979), 70 Ill. App. 3d 832, 836, 388 N.E.2d 894.) Thus, the voluntary manslaughter charge was not required to be formally joined under Ill. Rev. Stat. 1981, ch. 38, par. 3-3(b). Further, Ill. Rev. Stat. 1981, ch. 38, par. 3-4(b)(1), is inapplicable in circumstances such as exist here. That section has been held to bar prosecutions which could have been brought in the first trial of the cause, but were not (*People v. Goolsby*; cf. *People v. Harrison* (1946), 395 Ill. 463, 70 N.E.2d 596), or prosecutions of a lesser included offense where the defendant was previously charged with and acquitted of the greater offense and the trier of fact in the first trial was silent as to lesser included offenses. In the latter situation, acquittal of the lesser offenses is implied by the jury's silence. (See *People v. Chatman* (1981), 102 Ill. App. 3d 692, 698, 430 N.E.2d 257; *People v. Jenkins* (1976), 41 Ill. App. 3d 392, 393, 354 N.E.2d 139.) Neither of those situations exist in the present case. The voluntary manslaughter charge was implicitly joined with the murder charge in the original prosecution, and although the defendant was acquitted of murder, the jury was not silent as to the voluntary manslaughter offense.

The record reveals the jury was instructed on that charge and considered it, but was unable to return a unanimous verdict of either guilt or innocence. Under these circumstances, the jury was not silent on the voluntary manslaughter charge, and an acquittal of that charge need not be inferred from silence. Accord, *People v. Chatman*; *People v. Jenkins*.

A similar situation existed in *People v. Jenkins* (1976), 41 Ill. App. 3d 392, 354 N.E.2d 139. In that case, the defendant was indicted for attempted murder and the lesser included offense of aggravated battery. Following a jury trial, defendant was acquitted of attempted murder, but a mistrial was declared when the jury was unable to reach a verdict on the aggravated battery charges. The State attempted to re prosecute defendant for aggravated battery, and defendant filed a motion to dismiss claiming section 3-4(b)(1), Ill. Rev. Stat. 1973, ch. 38, par. 3-4(b)(1), barred a subsequent prosecution of the lesser included offense following acquittal on the greater offense. The trial court granted the motion, but the appellate court reversed, stating that section 3-4(b) was "never intended to be applied when the lesser included offense was charged in the indictment and a mistrial was declared because the jury failed to agree on a verdict." (41 Ill. App. 3d 392, 393, 354 N.E.2d 139.) Defendant here distinguishes *Jenkins* from the instant case on the ground that in *Jenkins* defendant was formally indicted on the lesser included offense, whereas here the formal indictment on the lesser offense was nol-prossed by the State. While this distinction does exist, it is in our opinion of little significance in light of established case law permitting a voluntary manslaughter conviction upon an indictment for murder. One of the principal purposes of an indictment is to put the defendant on notice of what he stands charged with so that he might adequately prepare his defense. Having once gone through a trial on these charges, the defendant certainly had such notice. (*People v. Brownell* (1980), 79 Ill. 2d 508, 524, 404 N.E.2d 181, cert. dismissed (1980), 449 U.S. 811, 66 L. Ed. 2d 14, 101

S. Ct. 59; *People v. Sims* (1982), 108 Ill. App. 3d 648, 651, 439 N.E.2d 518.) We therefore find the *Jenkins* case controlling here, despite the absence of a formal indictment for the lesser included offense of voluntary manslaughter.

Accordingly, the decision of the circuit court of Lake County denying defendant's motion to dismiss is affirmed.

AFFIRMED.

SEIDENFELD, P.J., REINHARD, J., concur.

APPENDIX B

ILLINOIS SUPREME COURT
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October 4, 1983

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No. 58604—People State of Illinois, respondent, vs. Kay
Ann Krogul, petitioner. Leave to appeal, Ap-
pellate Court, Second District.

The Supreme Court today *DENIED* the petition for
leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme
Court

P. S. The Mandate of this Court will issue to the
Appellate Court on October 26, 1983.